

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1231

To be argued by
ALAN LEVINE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1231

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHAKKRIP GITTISRIBOONGUL,

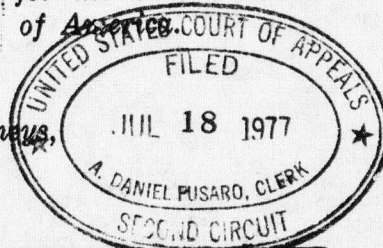
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Southern District of New York,
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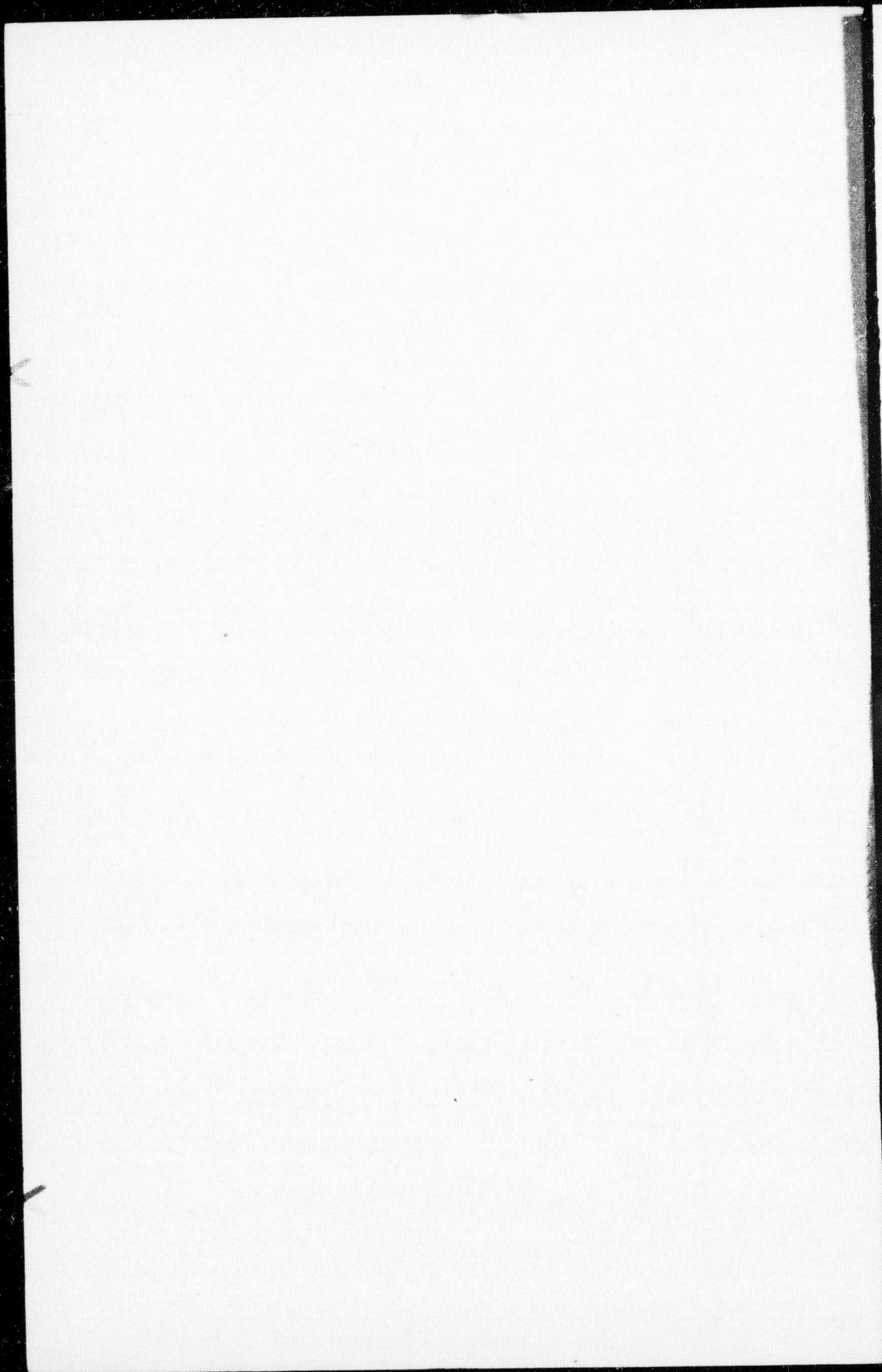


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—v.—

CHAKKRIP GITTISRIBOONGUL,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Chakkrip Gittisriboongul appeals from a judgment of conviction in the United States District Court for the Southern District of New York on February 23, 1977 after a five day jury trial before the Honorable Charles S. Haight, Jr., United States District Judge.

Indictment S 76 Cr. 933, filed December 6, 1976, charged Gittisriboongul, Chali Prateepmanowong, Check Fong, Milton Liu and Terradej Kachenchi with two counts of violating the federal narcotics laws. Count One charged all the defendants with conspiracy; Count Two charged all the defendants except Terradej Kachenchi with the distribution and possession with intent to distribute one ounce of heroin on June 16, 1976, in violation of Title 21, United States Code, Sections 812, 841(a) (1) and 841(b) (1) (B).

Trial commenced on February 16, 1977 and on February 23, 1977 the jury returned a verdict of guilty against Gittisriboongul and Kachenchi on Count One and against Gittisriboongul on Count Two. Prateepmanowong pleaded guilty prior to trial to Count One and testified for the Government. Fong pleaded guilty prior to trial and Liu remains a fugitive. On April 13, 1977, Judge Haight sentenced Gittisriboongul to a term of eight years' imprisonment and a term of three years' special parole.*

Statement of Facts

The Government's Case

In early May, 1976 Fong and Prateepmanowong met in Chinatown, New York City to discuss selling heroin to a third party whom Fong had met. (Tr. 32).** Fong's customer was Special Agent Jack Toal of the Drug Enforcement Administration acting in an undercover capacity. Prateepmanowong sought a source and found one several weeks later. This was Gittisriboongul, an old acquaintance. (Tr. 33).

* Judge Haight set aside the guilty verdict on Count Two against the defendant Gittisriboongul on the ground that no evidence against him was presented to the grand jury.

Kachenchi was sentenced on Count One to six years' imprisonment and three years' special parole. Kachenchi has not appealed his conviction.

Fong was sentenced on his guilty plea to eighteen months' imprisonment and three years' special parole. Prateepmanowong, proceeding by Rule 20, Fed. R. Crim. P., was sentenced to five years' imprisonment and three years' special parole in the United States District Court, Central District of California.

** "Tr." refers to pages in the trial transcript; "GX" refers to Government Exhibit; Br. refers to Appellant's Brief on appeal; App. refers to the Appellant's Appendix.

On or about June 15, 1976, Fong met with Prateepmanowong, who agreed to obtain a sample of the heroin for Fong's customer. (Tr. 35). Within hours Prateepmanowong met with Gittisriboongul and Kachenchi, and Gittisriboongul delivered a sample to Fong. (Tr. 36). That sample was satisfactory and the price was set at \$2,000 for one ounce. (Tr. 39-40; GX 1).

On June 16, 1976, near Delancey Street in Chinatown, Gittisriboongul delivered approximately one ounce of heroin to Prateepmanowong. (Tr. 40). Playing his middleman role, Prateepmanowong transferred the package to Fong on Essex Street; Fong traveled several blocks to Allen Street and in turn handed the package to Agent Toal. (Tr. 41-43; 189-90; GX 2, 2A). Under the observation of surveillance agents, Toal paid Fong \$2,800 in official advance funds. (Tr. 279-80). Each conspirator took his share and Prateepmanowong gave Gittisriboongul the \$2,000 owed him. (Tr. 43).

Further conversations followed between Fong and Agent Toal, and Prateepmanowong and Gittisriboongul. (GX 4, 4a, 5, 5a, 8 and 8a). Arrangements were finally made between them for a sale of one pound of heroin on June 22, 1976 in Florida, where Gittisriboongul resided. However, those plans were aborted by Agent Toal and his colleagues because adequate security was not available. (Tr. 46-50, 204).

Undeterred by the agent's change in plans, Gittisriboongul, Kachenchi, Prateepmanowong and Fong pursued the opportunity to sell a larger amount. New arrangements were made for the sale of one-half pound of heroin in Tampa, Florida on June 30, 1976. (Tr. 52-55; 205). On that morning Prateepmanowong and Fong met Agents Toal and James Kibble at La Guardia Airport, Queens, New York for the purpose of proceeding to Tampa to meet Gittisriboongul and Kachenchi. (Tr. 55,

205-06, 282). Agent Kibble, acting in an undercover capacity, carried \$17,000 in official advance funds. (Tr. 281). Upon arrival in Tampa, Gittisriboongul was introduced to Agents Toal and Kibble. (Tr. 59, 209, 283). Agent Toal displayed the \$17,000. (Tr. 59, 210).

Shortly thereafter, Gittisriboongul, Prateepmanowong, Fong and Agent Toal proceeded to the Tung Tung Restaurant to await the delivery of the heroin. (Tr. 60, 210-11, 291). Agent Kibble went to another nearby restaurant with the money. (Tr. 211, 284-85). At the Tung Tung Restaurant Gittisriboongul explained to Agent Toal that only six ounces were available since two ounces had been sold to another person earlier in the day. (Tr. 60-61, 212-13). After Kachenchi arrived and handed car keys to Gittisriboongul, Agent Toal followed Gittisriboongul to the car and they went to the Red Lobster Restaurant where Agent Kibble was waiting with the money. (Tr. 62, 214-16, 293). Once in the car Gittisriboongul showed Agent Toal the heroin package with the brand name "DOUBLE UOGLOBE." (Tr. 216). Everyone proceeded to the Red Lobster parking lot, and Gittisriboongul delivered approximately six ounces of heroin and received \$13,500 from Agent Toal. (Tr. 216-17, 285-86, 293; GX 3).

The Defendant's Case

Gittisriboongul presented no evidence.

ARGUMENT

The Use of Leading Questions in the Grand Jury Does Not Invalidate an Indictment.

The sole issue raised by this appeal is whether an indictment, valid on its face, may be dismissed on the ground that the evidence presented in the grand jury was elicited by use of leading questions. Gittisriboongul

argues that such testimony constituted incompetent evidence, and therefore his indictment by a grand jury on the basis of this evidence deprived him of due process as required by the Fifth Amendment of the Constitution. Gittisriboongul presents no authority supporting this claim, nor does he present any salient reason for this Court to adopt this novel constitutional argument.

The indictment against Gittisriboongul rested upon the testimony before the grand jury of Agent Jack Toal, who personally dealt with the defendants in an undercover capacity.* Agent Toal's testimony was elicited by leading questions propounded by Assistant United States Attorney. In response to questions which summarized conversations and meetings with the various defendants during the course of the investigation, the agent affirmed that the events about which he was asked had indeed occurred.

The essential premise of the defendant's argument is that the answers to leading questions constitute incompetent evidence. He cites no law to support this assumption which is plainly wrong. Testimony elicited by leading questions is competent evidence. This is seen by the fact that evidence elicited at trial on cross-examination is given the same weight as other evidence, see e.g., *United States v. Conlin*, 551 F.2d 534, 537 (2d Cir. 1977), as well as by the fact that a sworn witness responding to a leading question is bound by his answers and any false statement would subject him to prosecution for perjury. See 18 U.S.C. § 1623 (grand jury perjury statute contains no limitation on form of question); *United States*

* Agent Toal also presented evidence bearing on the chemical analysis of the narcotics. As to this testimony, the grand jury received the appropriate instruction from the Assistant United States Attorney to the effect that such hearsay testimony was proper but that the direct testimony was available should they so desire. (App. Grand Jury minutes at 16).

v. *Bonacorsa*, 528 F.2d 1218, 1219-20n.3-5 (2d Cir. 1976) (grand jury perjury consisted primarily of leading questions and answers thereto).

It is axiomatic that an indictment, returned by a legally constituted grand jury, if valid on its face, is enough to call for a trial on the merits. *United States v. Calandra*, 414 U.S. 338 (1974); *Lawn v. United States*, 355 U.S. 339 (1958); *Costello v. United States*, 350 U.S. 359, 363 (1956); *United States v. Guillette*, 547 F.2d 743, 752 (2d Cir. 1976); *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975). Neither the Constitution, nor the common law, nor any applicable statute subsequently promulgated by Congress provides grounds for attacking an indictment by contesting compliance with evidentiary rules. In *Costello v. United States*, *supra*, Frank Costello, charged with tax evasion, claimed that the testimony before the grand jury of revenue agents who summarized the examinations of 144 witnesses and 368 exhibits was incompetent evidence. That claim was rejected with the Court stating that:

“[N]either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act.” *Costello v. United States*, *supra*, 350 U.S. at 362.

Both before and since *Costello v. United States*, *supra*, courts have made clear that with respect to the application of evidentiary rules to the grand jury, the Constitution did not change existing practice at common law. *United States v. Mandujano*, 425 U.S. 564 (1976); *United States v. Calandra*, *supra*; *Blair v. United States*, 250 U.S. 273, 282 (1919). Thus, it is repeatedly observed that the grand jury, unlike an adversary proceeding, has “traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial.”

United States v. Calandra, *supra*, 414 U.S. at 349.* Since it was long the English practice that grand jurors were free to act on their own knowledge if they chose to do so, there could be no authority under common law for "looking into . . . the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof . . .," *United States v. Reed*, 27 Fed. Cas. 727, 738 (1852), or upon incompetent evidence. *Holt v. United States*, 218 U.S. 245 (1910). Accordingly, the limitation appellant seeks to impose on the presentation of grand jury testimony can find no support in common law.

Even more damaging than the absence of authority is clear statutory law which stands contrary to the defendant's position. The Federal Rules of Evidence, effective July 1, 1975, while providing that leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony, Rule 611(c), Fed. R. Evid, specifically announce their inapplicability to proceedings before grand juries. Rule 1101(d)(2). Fed. R. Evid.

Reaching for support, the defendant cites *United States v. Estepa*, 471 F.2d 1132, 1135-37 (2d Cir. 1972) but that case simply does not govern here. In *Estepa*, this Court dismissed an indictment on the ground that the prosecutor failed to advise the grand jury that the hearsay testimony received was not first-hand informa-

* Similarly, an indictment is not invalidated by its reliance on illegally obtained evidence. *United States v. Blue*, 384 U.S. 251, 255 n.3 (1966); *United States v. Doe*, 455 F.2d 1270, 1274 (1st Cir. 1972); *United States v. Johnson*, 419 F.2d 53, 58 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970); *Hunter v. United States*, 405 F.2d 1187 (9th Cir. 1969); *United States ex rel. Almeida v. Rundle*, 383 F.2d 421 (3d Cir. 1967), *cert. denied*, 393 U.S. 863 (1968).

tion and that such eyewitness testimony was available. The supervisory power of this Court was exercised under those circumstances only because this Court on earlier occasions, see *e.g. United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966), *cert. granted*, 386 U.S. 940, *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967), had given "clear warning" that such practice was improper. 471 F.2d at 1137. In contrast, the propounding of leading questions in this case was not violative of any statute, rule or case law and indeed, was well within the leaway contemplated by the case law and Rules of Evidence which specifically free the grand jury from evidentiary strictures.

Far more pertinent than *Estepa* is *United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973), in which the defendant's motion to dismiss an indictment was based on the claim that the grand jury proceedings were infected by the testimony of one whose mental competence was subject to question.* Like Gittisriboongul's argument here that the grand jury was unable to assess the credibility of Agent Toal, *Harrington* relied on *United States v. Estepa*, *supra*, and claimed that the grand jury should have been advised of the witness' mental condition. This Court, rejecting defendant's argument on the ground that the grand jury presentation was proper, commented upon appellant's reliance on *Estepa*:

"Appellant would have us extract from *Estepa* a requirement that the prosecution has a broad and amorphous duty to apprise the grand jury of the quality of all evidence presented to it. Whatever the scope of such a duty, if indeed a duty exists, there seems to be no substantial ground to challenge the prosecutor's presentation here." 490 F.2d at 489-90.

* The witness who testified before the grand jury admitted to be "addicted to heroin, all kinds of drugs", but he was eventually adjudged incompetent to stand trial. 490 F.2d at 489.

The defendant presents no persuasive policy considerations in support of his effort to have this Court mandate evidentiary rules to govern presentations to the grand jury and, we suggest, there are substantial reasons for declining to institute such rules. The injection of evidentiary requirements into grand jury proceedings can only generate litigation over adherence to those rules, creating unnecessary hurdles to the successful completion of a grand jury investigation. See, e.g., *In the Matter of A Grand Jury Subpoena Served Upon David Doe*, 551 F.2d 899, 902 (2d Cir. 1977). To permit such impediments to the function of the grand jury would disserve the public by limiting the grand jury's traditionally unimpeded ability to investigate criminal activities. *United States v. Mandujano*, *supra*; *United States v. Calandra*, *supra*.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
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) ss.:
COUNTY OF NEW YORK)

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